Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,

v.

JETT J. MASON, JR.,
Respondent.

On Petition For Writ of Certiorari to the
Court of Appeals of Texas, Fifth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a domestic violence victim's statement that she was assaulted and threatened with death, made to a police officer at the scene while the person who made the threat was still present, was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004).

2. Whether a police officer's asking a crying, upset, injured woman why she called the police, upon the officer's arrival at the scene in response to an emergency call, was interrogation under *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR WRIT OF CERTIORARI

The Court of Appeals of Texas, Fifth District, erroneously held that the admission into evidence of a cry for help the non-testifying domestic violence victim made as an excited utterance to a police officer responding to an emergency call was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court of Appeals of Texas, Fifth District, also erroneously held that when the police officer arrived at the scene in response to an emergency call and asked the crying, upset, injured woman why she called the police, that was interrogation under *Crawford v. Washington*, 541 U.S. 36 (2004).

The lower court's decisions conflict with various state courts of last resort and United States Courts of Appeals. The Court should grant this petition to resolve the conflict and address these important and unsettled questions of federal constitutional law.

OPINION BELOW

The Court of Appeals of Texas, Fifth District, reversed Mason's conviction on June 30, 2005. *Mason v. State*, 173 S.W.3d 105 (Tex. App. — Dallas 2005); PA[1] 1-12. The Texas Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 13.

JURISDICTION

The Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 14. Thus, the State's petition for writ of certiorari is timely filed on or before May 2, 2006. SUP. CT. R. 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] "PA" refers to the appendix to the instant petition for certiorari review, and is followed by page references.

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

The court below succinctly summarized the facts of this case:

> A jury convicted Jett J. Mason, Jr. of misdemeanor assault and assessed his punishment at confinement in the Dallas County jail for one day. See Tex. Pen. Code Ann. § 22.01(a)(1), (b) (Vernon Supp. 2004-05). Following the jury's recommendation, the trial court suspended imposition of the sentence and placed appellant on community supervision for six months.
>
> * * *
>
> Donald Blasingame, a patrol sergeant with the Seagoville Police Department, and the State's only witness at trial, testified that on July 6, 2002, he responded to a 911 disturbance call at a Seagoville residence. When Blasingame arrived, [Sarah Henderson], who was upset, crying, and angry, answered the door. In response to Blasingame's question about why she called the police, [Henderson] said that she and her boyfriend, later identified as appellant [Jett Mason], had been sleeping when his cellular telephone rang. When [Henderson] woke [Mason] up to answer the telephone, he slapped her on the face, shoved her off the bed, put his hand on her throat, and told her he was going to kill her. Blasingame observed red marks and swelling around [Henderson's] mouth and nose, which were consistent with her statements.

> Blasingame also spoke to [Mason]. [Mason] told Blasingame that he accidentally hit [Henderson] when he reached over to get the telephone. Disbelieving [Mason's] version, Blasingame arrested [Mason] based on [Henderson's] oral statements and his observations at the scene.
>
> [Henderson] did not appear at trial. [footnote 3-The record reflects [Mason] and [Henderson] were still together at the time of trial]. The State sought to prove its case through Blasingame's hearsay testimony of [Henderson's] oral statements made to him at the scene. [Mason] objected to the out-of-court statements on both hearsay and Confrontation Clause grounds. Following a pretrial hearing outside the jury's presence, the trial court ruled [Henderson's] out-of-court oral statements to Blasingame were admissible.

PA 1-2. The substance of the 911 call was not introduced into evidence. In response to the 911 call, the officer was dispatched at 7:24 p.m. 2 RR[2] 14. Mason was arrested at 7:37 p.m. after the officer spoke with Henderson and Mason 2 RR 12, 14. The trial court determined that Henderson's statements qualified as excited utterances under TEX. R. EVID. 803(2). PA 4.

II. Proceedings in the Court Below

The lower court reversed the trial court's judgment on June 30, 2005. PA 13. The state court of appeals recognized that courts have split on the question. PA 7. The state court disagreed with the State's argument that an excited utterance is not made under circumstances conducive to contemplation of future legal proceedings. PA 8. The court read into the State's argument that

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[2] "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by the volume number and followed by page number(s).

the contemplation be subjective. PA 8. That court observed that the test under *Crawford v. Washington*, 541 U.S. 36 (2004), is objective, rather than subjective. PA 8. Turning to interrogation, the court declined to equate "interrogation" in the Sixth Amendment context with "interrogation" in the Fifth Amendment context, although the State had not asked that the court do so. PA 9. Instead, the State argued that Blasingame's inquiry into why he had been summoned was not "interrogation," as that term is understood colloquially. State's appellate brief at 10. The state court of appeals then concluded that Henderson's statements resulted from an interrogation within the meaning of the Sixth Amendment, so they were testimonial. PA 10. Although the court purported to so conclude "[f]or the reasons set out above," there were no actual reasons previously set out in its opinion that explained its decision. The court further determined that even if the statements were not the product of interrogation, they were testimonial because they were made under circumstances which would lead an objective witness reasonably to believe that those statements would be available for use at a later trial. PA 10.

The Texas Court of Criminal Appeals refused the State's petition for discretionary review on February 1, 2006. PA 13. The instant petition follows.

REASONS FOR GRANTING THE WRIT

This Court has granted petitions for writ of certiorari on very similar issues in *Hammon v. Indiana*, No. 05-5705, and *Davis v. Washington*, No. 05-5224, concerning whether statements to a 911 operator and statements to police responding to an emergency dispatch are testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). This Court's decision in *Hammon* and *Davis* will affect the present case.

The state court decided an important federal question that has not been, but should be, settled by this Court. Although this Court is considering similar questions in *Hammon* and *Davis*, this case presents facts significantly distinguishable from *Hammon* and *Davis* on this important federal question that warrant this Court's attention. In this case the officer only asked Henderson why she called the police, which was an innocuous preliminary question by the officer acting in his public safety, community caretaking role. Henderson's statements, that Mason had hit her and had threatened to kill her, were excited utterances. Mason was still at the scene.

The issue involved is one of great and continuing importance. The prevalence of domestic violence is astonishing. A vast number of domestic violence cases either have to be dismissed or have to be tried based on victim statements of the type used in the present case, because of the lack of cooperation of the victim and the lack of the victim's presence at trial. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 749-50 & n.50, 769, 772-73; Donna D. Bloom, Comment, *"Utter Excitement" about Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 731. This Court's guidance in this area is necessary after *Crawford v. Washington*.

The state court's decision on this important question of federal law conflicts with decisions of other state courts of last resort and with decisions of United States Courts of Appeals. *See* cases listed *infra* at 14, 20-22. The state court's utilization of the objective test failed to account for the nature of the statement as a cry for help through an invocation of the police's community caretaking or public safety function, the significance of the excited utterance, and the dynamics of domestic violence.

The statement in this case was non-testimonial because it was a cry for help, in the form an excited utterance, and an invocation

of the police's community caretaking or public safety function. Mason had threatened to kill Henderson, and Mason was still at the scene. The statement in the present case was non-testimonial because it was not the product of interrogation. On arrival at the scene, the responding officer just asked the crying, upset, and obviously injured victim why she called the police. That was not interrogation in the colloquial sense.

I. This Court Has Granted Petitions for Writ of Certiorari on Very Similar Issues in *Hammon v. Indiana*, No. 05-5705, and *Davis v. Washington*, No. 05-5224.

On March 20, 2006, this Court heard oral arguments in *Hammon v. Indiana*, and *Davis v. Washington*. Those cases present this Court with the issue of whether a victim's oral statement to a police officer, or to a 911 operator, were testimonial statements within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

A. *Crawford*

In *Crawford*, this Court held that the admission of testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Id.* at 68. Although the Court found it unnecessary to set out a comprehensive definition of testimonial, *id.* at 68, the Court noted the existence of at least three formulations of the core class of "testimonial" statements: (1) "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial."[3] *Id.* at 51-52. This Court further stated, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. This Court noted that it used the term "interrogation" in a colloquial sense. *Id.* at 53 n.4.

B. *Hammon*

In *Hammon*, two police officers responded to a domestic disturbance dispatch at the Hammons' residence. HRB[4] at 1; HPB[5] at 1. At the residence, the police officers found a frightened Ms. Hammon on the front porch. HRB at 1; HPB at 1. One of the officers asked Ms. Hammon if there was a "problem" or if "anything was going on," to which Ms. Hammon responded, "No, nothing was the matter . . . that everything was okay." HRB at 2; HPB at 1. At this point, the officers did not want to leave, so they asked permission to enter the home, and, once inside, one officer went into the kitchen and started questioning Mr. Hammon, and the other officer stayed in the living room, and questioned Ms. Hammon. HRB at 2–4; HPB at 1–2. The officer did not see any injuries on Ms. Hammon. HRB at 4; HPB at 2 n1. Thereafter, Mr. Hammon was arrested, and the officer had Ms. Hammon complete

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[3] This Court found it unnecessary to decide the particular parameters of what is "testimonial," because the statement in *Crawford* was testimonial under any standard. Similarly, this case does not require this Court to make that decision, and the State does not argue for a particular definition, because the statements in this case are not testimonial under any of the three formulations of "testimonial" suggested in *Crawford*.

[4] "HRB" refers to the brief filed in this Court by the Respondent in *Hammon v. Indiana*, No. 05-5705.

[5] "HPB" refers to the brief filed in this Court by the Petitioner in *Hammon v. Indiana*.

and sign a battery affidavit recounting the events of the evening. HRB at 4; HPB at 2–3.

At trial, Ms. Hammon did not testify, but the oral statements that Ms. Hammon made to the officer in response to his questioning were admitted under the excited utterance exception to the hearsay rule. HPB at 3; HRB at 4–5.

C. *Davis*

Similarly, in *Davis*, Ms. McCottry called 911, but before reporting a problem, Ms. McCottry hung up the telephone. DPB[6] at 5; DRB[7] at 1. The 911 operator recalled the telephone number, and Ms. McCottry answered, but was shouting to another person in her apartment. DPB at 1. After locking the door to her apartment, Ms. McCottry resumed the conversation with the 911 operator. DPB at 5; DRB at 1. Ms. McCottry reported that her exboyfriend had violated a protective order and had beaten her. DPB at 5; DRB at 1. Thereafter, the 911 operator asked Ms. McCottry a series of questions in an interview that lasted for about four minutes. DPB at 5. During this interview, the 911 operator learned what had transpired, whom was involved, and even the birth date of the suspect. DPB at 5. At trial, Ms. McCotty did not testify, but the statements that she made to the 911 operator were admitted under the excited utterance exception to the hearsay rule. DPB at 7; DRB at 3.

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[6] "DPB"refers to the brief filed in this Court by the Petitioner in *Davis v. Washington*, No. 05-5224

[7] "DRB" refers to the brief filed in this Court by the Respondent in *Davis v. Washington.*

D. The Effect of *Hammon* and *Davis* on the Present Case

1. If the Statements in *Hammon* or *Davis* Are Not Testimonial, this Court Should Grant this Petition, Vacate the State Appellate Court's Judgment, and Remand the Case to That Court.

This Court's decision in *Hammon* and *Davis* will impact this case. If this Court holds that the statements in *Hammon* or *Davis* were not testimonial such that their admission did not violate the Sixth Amendment, that decision would likely compel the state court in this case to similarly find no Sixth Amendment violation.

In this case, the trial court held a pretrial hearing to determine whether Henderson's statements to Blasingame were admissible. 2 RR 10-27. Counsel for both sides argued whether the statements were admissible in light of *Crawford*. 2 RR 16-21. The trial court ruled that the statements could be introduced into evidence. 2 RR 27. Blasingame testified about the statements at trial. 2 RR 36

On July 6, 2002, Blasingame was dispatched following a 911 call.[8] PA 2; 2 RR 10, 34–35. Blasingame was dispatched at 7:24 p.m., and he arrested Mason at 7:37 p.m. after talking with both Henderson and then Mason 2 RR 12, 14. Therefore, Blasingame arrived very soon after the 911 call. Upon arrival, an "extremely upset," "crying," and "mad" Henderson answered the door. PA 2; 2 RR 10, 35–36, 41–42. Henderson had some redness and swelling beginning around her mouth and nose. PA 2; 2 RR 10, 36. Blasingame asked Henderson one question, "Why did you call the police?" PA 2; 2 RR 13, 22, 23, 24, 26, 27, 50. Blasingame testified that he was not interrogating her, he was merely trying to find out why he was there. 2 RR 22–23. In response to this one question, a very upset and crying Henderson told Blasingame that,

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[8] The substance of the 911 call was not introduced into evidence.

while she was in bed with Mason, Mason's cell phone rang. PA 2; 2 RR 11–12, 36. She told Mason that his cell phone was ringing, and Mason then slapped her in her face. PA 2; 2 RR 11, 36. Mason shoved her off of the bed and slapped her some more. PA 2; 2 RR 11, 36. He then put his hand on her throat. PA 2; 2 RR 11, 36. Mason told Henderson that he was going to kill her. 2 RR 11, 36.

Here, the level of police questioning did not come close to that in *Hammon* or *Davis*, so it had even less potential to be an interrogation than the questioning in *Hammon* or *Davis*. Henderson's statement was made in response to the first, initial question by Blasingame: "Why did you call the police?" 2 RR 13, 22, 23, 24, 26, 27, 50. As testified to by Blasingame, this type of initial question was routine practice, and was made in an attempt to ascertain why the police were called. 2 RR 13, 22. The statements made in *Hammon* and *Davis* were made only after a series of questions by officials. The initial communication with Ms. Hammon was made when one of the officers asked if there was a "problem" or if "anything was going on," to which Ms. Hammon responded "No, nothing was the matter . . . that everything was okay." HRB at 2; HPB at 1. The officers asked if they could come into the house. HRB at 2–4; HPB at 1–2. The officers entered the home, separated the husband and wife, and one officer asked Ms. Hammon questions regarding the night's events until the statement at issue was uttered. HRB at 2–4; HPB at 1–2. Likewise, and unlike the case-at-bar, the statement at issue in *Davis* was made in response to a four-minute series of questions by the 911 operator. DPB at 3–5.

Therefore, because Blasingame asked only one, initial question to help ascertain the nature of the disturbance, and because he did not participate in the type and extent of questioning seen in *Hammon* and *Davis*, if the questioning in *Hammon* or *Davis* is not be found to have been interrogation, then Blasingame's question cannot be considered interrogation.

Finally, the statements by Henderson were more clearly a cry for help from Blasingame in his public safety, community caretaking role, than the statements in *Hammon* and *Davis*. That is buttressed by the excited utterance nature of the statements. Henderson briefly relayed what Mason had done, including his threat to kill her. Henderson was still present at the scene when Blasingame arrived. Henderson called the police for help and protection. Mason told Henderson that he would kill her, and, at the time the police were summoned, Henderson was acting under that looming threat because Mason was still there at their residence. 2 RR 11–12, 14, 36–37. Therefore, unlike the *Hammon* and *Davis* cases, Henderson was faced with the looming threat of death imposed upon her by Mason, a man who was not fleeing the scene. The officer was dispatched at 7:24 p.m. in response to the 911 call, and Mason was arrested at 7:37 p.m.[9] 2 RR 14. Therefore, Henderson's statement to Blasingame was made shortly after the 911 call.

Thus, if this Court determines that the statements in either *Hammon* or *Davis* were not testimonial, this Court should grant this petition for writ of certiorari, vacate the state court's judgment, and remand the case to that court for reconsideration in light of *Hammon* and *Davis*.

2. If the Statements in *Hammon* and *Davis* Are Testimonial, this Court Should Grant this Petition, Address the Significant Distinctions in this Case, and Determine That the Statements in the Present Case Were Not Testimonial.

If this Court concludes that the statements in both *Hammon* and *Davis* are testimonial, this Court should grant this petition, address the statements and surrounding circumstances in this case, and

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[9] Blasingame spoke with Mason after speaking with Henderson. 2 RR 12, 14. Mason had not been arrested yet when Blasingame and Mason spoke. 2 RR 12.

determine that Henderson's statements were not testimonial.

Unless this Court makes the broad holding in *Hammon* and *Davis* that any statement to a police officer or a 911 operator about another's criminal activity is testimonial, regardless of the circumstances, a determination that the statements in *Hammon* and *Davis* were testimonial does not dictate such a holding in this case.

For the same reasons set forth in the immediately preceding section of this petition, there are significant distinctions between the statements and surrounding circumstances in this case and those in *Hammon* and *Davis*. Even if this Court concludes that the statements in *Hammon* and *Davis* were testimonial, this petition should be granted, and, at the least, the judgment of the state appellate court should be vacated and the case remanded to that court for reconsideration in light of the guidance that will be provided by this Court in *Hammon* and *Davis*.

However, the State urges that if this Court concludes the statements in *Hammon* and *Davis* were testimonial, this Court should grant this petition and consider this case on its merits. In light of the great importance and the prevalent occurrence of the federal question presented here, as explained in Part IV, *infra*, this Court should seize this opportunity to provide further guidance to the courts and litigants in the United States on the use of cries for help in the form of excited utterances in domestic violence cases.

II. Although the State Court Purported to Use an Objective Test to Determine Whether the Statements Was Testimonial, the Court Ignored the Circumstances Surrounding the Statements.

In discussing the third formulation of "testimonial" suggested in *Crawford*, the state appellate court held that an objective, rather than a subjective, test is appropriate for determining whether statements that were made under circumstances which would lead

an objective witness reasonably to believe that the statement would be available for use at a later trial. PA 8. The State has no quarrel with that holding, because that formulation of "testimonial" refers to an "objective witness." *Crawford v. Washington*, 541 U.S. at 52. However, that does not mean that the court should ignore the circumstance surrounding the making of the statement. That particular formulation also inquires about the circumstances under which the statement was made. *Id.* The state court did not examine those circumstances and discounted the State's argument that the court should engage in such an examination. Such an examination is necessary to determine whether the statements were testimonial.

III. Henderson's Statements Were Not Testimonial.

A. Henderson's Statements Were Not the Product of Interrogation.

Police officers perform the investigative functions that justices of the peace exercised in conducting examinations under the Marian statutes, which led to the abuses about which the Confrontation Clause was primarily concerned. *Crawford v. Washington*, 541 U.S. at 53. Therefore, statements taken by police officers in the course of interrogations are testimonial. *Id.* at 52, 53.

This Court used the term "interrogation" in its colloquial sense, rather than a technical legal sense, but found it unnecessary to select a particular definition of "interrogation" in *Crawford*. *Id.* at 53 n.4.

When determining what is meant by "interrogation," an examination of common definitions, as found in dictionaries, is necessary, set against the backdrop of the historical practices and abuses the Confrontation Clause was designed to protect against.

> The dictionary definition of "interrogation" is "question[ing] typically with formality, command, and thoroughness for full information and circumstantial detail." . . . Webster's Third New Int'l Dictionary 1182 (1993). *See*

American Heritage Dictionary 685 (4th ed.2000) (defining "interrogate" as "[t]o examine by questioning formally or officially"); Merriam-Webster's Dictionary of Law (1996) ("to question formally and systematically"). That is the "colloquial" understanding of what "interrogation" entails, *Crawford, supra* at 53 n. 4, 124 S.Ct. 1354, and that is the definition we should be applying to comply with *Crawford.*

The proposition that "police interrogation" involves structured, thorough, and detailed questioning has considerable support in cases to date. *See, e.g., Mungo v. Duncan*, 393 F.3d 327, 336 n. 9 (2d Cir.2004), *cert. denied sub nom. Mungo v. Greene*, --- U.S. ----, 125 S.Ct. 1936, 161 L.Ed.2d 778 (2005) (rejecting proposition that "interrogation" encompasses "any asking of questions," in favor of dictionary definition "to question typically with formality, command, and thoroughness for full information and circumstantial detail," as that definition was "more consistent" with types of testimonial statements mentioned in *Crawford*); *Anderson v. State*, [111 P.3d 350, 353 (Alaska Ct. App. 2005)] ("interrogation" refers to "category of formal, official, and systematic questioning"); *People v. Corella*, 122 Cal.App.4th 461, 468, 18 Cal.Rptr.3d 770 (2004) ("police interrogation" under Crawford "requires a relatively formal investigation where a trial is contemplated"); *United States vs. Webb*, D.C. Sup.Ct. No. DV-339-0400 (Nov. 9, 2004); *State v. Hembertt*, 269 Neb. 840, 850, 696 N.W.2d 473 (2005) ("structured police questioning"). *See also Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005) ("police interrogation" for purposes of confrontation clause "is properly limited to attempts by police to pin down and preserve statements").

Commonwealth v. Gonsalves, 833 N.E.2d 549, 564-65 (Mass. 2005) (Sosman, J., concurring).

> The [Supreme] Court's reasons for applying the confrontation clause to statements procured by "police interrogation" also included a more general concern about the evil the confrontation clause was intended to address. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, *supra* at 56 n.7, 124 S.Ct. 1354. However, when the police arrive at the scene and ask basic, preliminary questions (*e.g.*, "What's going on?"), they do not know whether they will be told about a crime, an accident, a misunderstanding or a false alarm; nor do they know whether anyone will report that there is some injury or imminent danger that needs their attention. When the police are trying to ascertain such basic information, they do not yet have "an eye toward trial," *id.*– they are trying to find out, among other things, whether there is even any crime to be investigated, and they are simultaneously trying to ascertain whether there is any ongoing threat or need for medical attention. Such preliminary questions on arrival at the scene ("What's happening?" "What did he do?" "Where is he now?") are not intended to produce "testimony" but to assess the situation and inform the officers' decision as to what immediate steps they must take. I see no "unique potential for prosecutorial abuse," *id.*, in such preliminary inquiries.
>
> Once the police are in fact investigating an alleged crime and preparing a case for potential prosecution, police questioning that takes on some aura of formality, solemnity, or (at a minimum) thoroughness, is what makes it

"interrogation" for purposes of the confrontation clause.

Id. at 564.

"Interrogation" conveys something more than the simple asking of a question. It connotes a particular subset of questioning — that which officially inquires with some degree of focus or concentrated purpose in a formal, solemn, systematic, or thorough manner, seeking details about a specific subject matter — in these types of cases, a crime — that is being investigated.

Here, when Blasingame arrived in response to a dispatch, facing an extremely upset, crying person, and without knowing what situation lay ahead, he asked Henderson why she called the police. In that context, the question was not interrogation in its colloquial sense, nor does it call to mind justices of the peace seeking to secure solemn testimony to be used in a criminal trial, whether for a great crime of treason against the crown or otherwise.

The question was not even investigative. At that point, Blasingame had no idea whether a crime actually had been committed, whether a medical emergency existed, or whether there was just an argument occurring at the residence. When Blasingame asked the question, he was wearing all hats — that of the enforcer of laws, that of the apprehender of criminals, that of the provider of public safety and caretaker of the community, and even that of an authority figure who can serve as an on-the-spot arbitrator, mediator, counselor, or adviser if necessary. *See Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003) (a police officer has duties in addition to apprehending criminals, such as the duty to aid people in danger of physical harm, the duty to assist persons who cannot care for themselves, and the duty to resolve conflict), citing WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE 6.6 (1996), which in turn quoted the ABA STANDARDS FOR CRIMINAL JUSTICE § 1-1.1 (2d ed. 1980).

Moreover, Henderson contacted the police, and not vice versa. That would not itself make the statements non-testimonial, because a statement can be testimonial without the interrogatory probing and prodding by police. However, that would preclude the statements from being the product of interrogation, since Henderson naturally would have wanted to say what she said to the police, inasmuch as she called them to the scene.

Consequently, Henderson's statements were not the product of interrogation such as would render them testimonial.

B. Henderson's Statements Were a Cry for Help, Invoking the Public Safety and Community Caretaking Function of the Police and Were Not Made under Circumstances Which Would Lead an Objective Witness Reasonably to Believe That the Statements Would Be Available for Use at a Later Trial.

The statements were not testimony under the first two proffered formulations of the core class of "testimonial" statements. They were not *ex parte* in-court testimony or its functional equivalent, and they were not extra judicial statements contained in formalized testimonial materials. *See Crawford v. Washington*, 541 U.S. at 51-52. The question is whether the statements fell within the purview of the third formulation proffered in *Crawford*.

1. The Nature of Domestic Violence and Why Domestic Violence Victims Call the Police

One scholar concludes it is "inconceivable" and "untenable" that a domestic violence victim would inform the police about a crime against her without being partially motivated by the desire to assist in the prosecution of the batterer and without a motivation to assist in making the batterer atone for his crime. Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36

SETON HALL L. REV. 327, 402. That is incorrect. It is neither inconceivable nor untenable. In fact, it is the norm.

Domestic violence victims commonly call the police for reasons other than to serve as the impetus for the batterers' incarceration and prosecution. That is because domestic violence crimes are significantly different from other crimes.[10]

"[T]here are two central features of domestic abuse. The first is that the abuse occurs within the context of an intimate relationship. The second is that the abuse is systematic." Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 65 LA. L. REV. 989, 995.

"[D]omestic violence relationships typically follow a three phase cycle: tension-building, acute battering, and loving contrition." Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 236. Once completed, the cycle repeats itself. *Id.* at 237.

> The unique characteristics of domestic violence make the battered woman an "atypical" victim. . . . [B]attered women have strong ties to their abusers and are likely to be more ambivalent about official intervention than is true of other victims of crime. The goal of domestic violence victims is often different than that of other crime victims; the battered woman's primary goal is simply to stop the violence. She is more interested in resolution than in restitution or retribution.

Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 319 (internal

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[10] The differences explain the lack of cooperation by domestic violence victims.

quotation marks omitted).

Because of the unique nature of domestic violence, victims frequently call the police for reasons other than an arrest and prosecution. "Battered women call the police for a variety of reasons — not necessarily to have their partners arrested and prosecuted. For example, a woman might call the police to send a message to the batterer that his violence is not acceptable." *Id.* at 316. "She might reason that police officer could [defuse] an explosive situation or frighten her batterer into ceasing his abuse." Barbara Fedders, Note, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 292. When a battered woman calls the police, she may want only medical assistance or the removal of the batterer from the home. Elaine Chiu, *Confronting The Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1230.

Domestic violence victims frequently do not want their abusers arrested or prosecuted. Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 660. In a study of Omaha domestic violence cases, 60% of the victims indicated they had not wanted an arrest made. Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 940. Similarly, a study in Charlotte showed that only 42% of victims of misdemeanor domestic violence insisted on an immediate arrest. *Id.* at 950.

Another law review article states, "[O]nly 11-24% of victims of intimate violence reported the incident to punish the offender." Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 n. 49.

The uniqueness of domestic violence cases can perhaps be best summed up by the following incident. A domestic violence victim asked that charges against the defendant be dismissed because the victim needed the bond money back. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers*, 7 WM. & MARY J. WOMEN & L. 383, 393.

2. The Cry for Help

Domestic violence victims call the police because they "need protection. The call is an act of survival — there is rarely an opportunity to think twice." Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1897.

> [A] number of state courts have considered whether statements made to the police during 911 calls or immediately upon their arrival at the scene of an ongoing or recent crime or emergency were testimonial, with most concluding that they were not. *See, e.g., Anderson v. State*, 111 P.3d 350, 353-56 (Alaska Ct.App.2005); *People v. Corella*, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770, 776 (2004);*Pitts v. State*, 272 Ga.App. 182, 612 S.E.2d 1, 5 (2005); *People v. West*, 355 Ill.App.3d 28, 291 Ill.Dec. 72, 823 N.E.2d 82, 88-92 (2005); *Hammon v. State*, 829 N.E.2d 444, 456-58 (Ind.2005); *State v. Barnes*, 854 A.2d 208, 211-12 (Me.2004); *People v. Walker*, 265 Mich.App. 530, 697 N.W.2d 159, 163- 66 (2005), *lv. app. granted*, 472 Mich. 928, 697 N.W.2d 527 (2005); *State v. Wright*, 701 N.W.2d 802, 811-14 (Minn.2005); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473, 482-84 (2005); *People v. Mackey*, 5 Misc.3d 709, 785 N.Y.S.2d 870, 872-74 (2004); *People v. Moscat*, 3 Misc.3d 739, 777 N.Y.S.2d 875, 879-80 (2004); *State v. Forrest*, 164 N.C.App. 272, 596

S.E.2d 22, 26-27 (2004), *aff'd*, 359 N.C. 424, 611 S.E.2d 833 (2005); *State v. Davis*, 154 Wash.2d 291, 111 P.3d 844, 849-51 (2005). *But see, e.g., Lopez v. State*, 888 So.2d 693, 698-700 (Fla.Dist.Ct.App.2004); *People v. Cortes*, 4 Misc.3d 575, 781 N.Y.S.2d 401, 404-07, 415-16 (N.Y.Sup.Ct.2004); *State v. Powers*, 124 Wash.App. 92, 99 P.3d 1262, 1264-66 (2004).

As a general matter, the cases holding that such statements were not testimonial have cited the same factors I have relied upon here, including (i) an ongoing or very recently abated threat faced by the declarant, *see, e.g., Pitts*, 612 S.E.2d at 4; *West*, 291 Ill.Dec. 72, 823 N.E.2d at 88-91; *Wright*, 701 N.W.2d at 811, 813; *Hembertt*, 696 N.W.2d at 483-84; *Moscat*, 777 N.Y.S.2d at 879-80; *Forrest*, 596 S.E.2d at 27; *Davis*, 111 P.3d at 850-51; (ii) the declarant's initiation of contact with the police, and not vice versa, *see, e.g., Corella*, 18 Cal.Rptr.3d at 776; *Pitts*, 612 S.E.2d at 4; *Barnes*, 854 A.2d at 211; *Moscat*, 777 N.Y.S.2d at 879; *Forrest*, 596 S.E.2d at 27; (iii) the volunteering of information to the police, as opposed to a statement elicited through interrogation or structured questioning, *see, e.g., Forrest*, 596 S.E.2d at 27; and (iv) the nature of the information provided, reflecting a need for immediate aid rather than an intent to precipitate or assist in a criminal investigation or prosecution, *see, e.g., West*, 291 Ill.Dec. 72, 823 N.E.2d at 89, 91; *Hammon*, 829 N.E.2d at 458; *Barnes*, 854 A.2d at 211; *Wright*, 701 N.W.2d at 813-14. The decisions reaching a different result, in contrast, typically feature distinguishable facts and circumstances, such as directed questioning by a 911 operator, *see Cortes*, 781 N.Y.S.2d at 404-07, or a statement which conveys information outside the scope of the declarant's need for immediate aid, *see Powers*, 99 P.3d at 1266.

United States v. Hadley, 431 F.3d 484, 505-06 (6th Cir. 2005) (Rosen J., opinion).

Federal courts of appeals have reached the same conclusion as the majority of state courts. *See, e.g., United States v. Brito*, 427 F.3d 53, 59-63 (1st Cir. 2005); *United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004).

Police officers do more than investigate crimes. They have a public safety, community caretaking function, also. "Local police officers . . . engage in . . . community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *see also South Dakota v. Opperman*, 428 U.S. 364, 368 (1976); *United States v. Hadley*, 431 F.3d at 502 (Rosen, J., opinion); *United States v. Brooks*, 367 F.3d 1128, 1135, 1137 (9th Cir. 2004); *Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003) (a police officer has duties in addition to apprehending criminals, such as the duty to aid people in danger of physical harm, the duty to assist persons who cannot care for themselves, and the duty to resolve conflict), citing WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE 6.6 (1996), which in turn quoted the ABA STANDARDS FOR CRIMINAL JUSTICE § 1-1.1 (2d ed. 1980).

3. The Excited Utterance

Courts diverge on whether excited utterances[11] are testimonial.

Some courts take the view that excited utterances never can constitute testimonial hearsay. Their rationale is that, by

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[11] In Texas, as in the federal system, excited utterances are not excluded by the rule against hearsay. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2); *see also* FED. R. EVID. 803(2).

definition, an excited utterance is made under the influence of a startling event and, thus, the declarant acts in response to that event rather than in response to interrogation or in anticipation of bearing witness. *See, e.g., United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (holding that excited utterances are not testimonial in nature because they are "emotional and spontaneous rather than deliberate and calculated"); *People v. Moscat*, 3 Misc.3d 739, 777 N.Y.S.2d 875, 880 (2004) (holding that an excited utterance is a cry for help and, therefore, not functionally equivalent to "a formal pretrial examination"). In each of these cases, the court upheld the admission of an "excited" 911 call in a criminal trial notwithstanding the declarant's unavailability. *See Brun*, 416 F.3d at 707; *Moscat*, 777 N.Y.S.2d at 880.

A second cluster of cases holds that the excited nature of the utterance has no bearing on whether a particular statement is testimonial. These courts effectively discount the excited nature of the utterance and focus instead on the declarant's objectively reasonable expectations. *See, e.g.*, [*U.S. v.*] *Arnold*, 410 F.3d [895,] 903 [(6th Cir. 2005)] (holding that, notwithstanding the excited nature of a 911 call, the declarant reasonably could expect that statements describing the crime and the perpetrator would be used prosecutorially); *Cortes*, 781 N.Y.S.2d at 415 (holding that all "[c]alls to 911 to report a crime are testimonial," even if they also qualify as excited utterances, because "the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding"). In each of these cases, the court ruled inadmissible in a criminal trial an "excited" 911 call due to the declarant's unavailability. *See Arnold*, 410 F.3d at 904; *Cortes*, 781 N.Y.S.2d at 416.

A third cadre of courts recognizes that the excited utterance

> inquiry and the testimonial hearsay inquiry are distinct but symbiotic; the startling event that gives rise to an excited utterance informs the Confrontation Clause analysis and often dissipates the very qualities of a statement that otherwise might render the statement testimonial. *See, e.g.*, *Arnold*, 410 F.3d at 914 (Sutton, J., dissenting) (reasoning that a frightened 911 caller rarely will have the state of mind needed to make a "solemn declaration" or a statement that he or she "would reasonably expect to be used prosecutorially"); *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005) (finding 911 call nontestimonial when declarant was "trembling, stuttering, crying [and] hyperventilating during the call") (internal quotation marks omitted) (alteration in original); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473, 483 (2005) (holding excited utterances made to officers during an ongoing threat to be nontestimonial because those utterances were "not made in anticipation of eventual prosecution" but "to assist in securing the scene and apprehending the suspect"); *Drayton v. United States*, 877 A.2d 145, 149-50 (D.C.2005) (similar). This approach suggests that courts must undertake a case-by-case examination of the totality of the circumstances in order to determine whether or not a particular excited utterance should be deemed testimonial in nature.

United States v. Brito, 427 F.3d 53, 60-61 (1st Cir. 2005).

The First Circuit chose a case-by-case approach. *Id.* at 61. If a statement is an excited utterance, the court looks to the circumstances to assess the likelihood that a reasonable person would have retained or regained the capacity to make a testimonial statement at the time of the utterance. *Id.* at 62.

Along the way, the First Circuit briefly discussed the cry for

help scenario.

> Ordinarily, statements made to police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications. Such a declarant usually speaks out of urgency and a desire to obtain a prompt response. It follows, therefore, that such statements will not normally be deemed testimonial.

Id.

This case does not compel a choice among the approaches, because the non-testimonial nature of Henderson's statements is not dependent on their being excited utterances.

4. Henderson's Statements Were Not Testimonial

When Henderson opened the door to Blasingame, Blasingame saw a crying, upset, angry, injured woman. He asked her why she had called the police. Henderson opened up and told him what Mason had done and said to her. As with most domestic violence victims, Henderson's statements reflected a need for immediate aid. Henderson's cry for help was particularly compelling because Mason had threatened to kill her. Because Mason was still present, so was the threat.

Henderson's statements were non-testimonial because they were a domestic violence victim's cry for help in the face of a looming threat. The parts of Henderson's statements that did not directly inform Blasingame about the threat specifically, were nevertheless communications placing the threat in context. They were an integral part of the cry for help and, therefore, not testimonial. The admission of Henderson's statements into evidence did not violate

the Confrontation Clause.[12]

The state appellate court erred by looking only at the words that Henderson spoke, without accounting for the circumstances under which they were spoken.

IV. The Issue in this Case Compels Further Guidance from this Court, Because of the Prevalence of Domestic Violence and the Vast Number of Domestic Violence Cases That Either Have to Be Dismissed or That Have to Be Tried Based on Victim Statements of the Type Used in the Present Case.

A. Prevalence of Domestic Violence

The prevalence of domestic violence is astonishing.

> A woman is abused every fifteen seconds. Every year, over two million women report being abused. . . . One out of four pregnant women has a history of domestic abuse. Domestic abuse is the leading cause of injury to women aged fifteen to forty-four. . . . Twenty-two to thirty-five percent of women who visit medical emergency facilities are there for injuries related to domestic abuse.

Kirsch, 7 WM. & MARY J. WOMEN & L. at 385-86. The Federal Bureau of Investigation reported over twenty years ago that in the United States a man beats a woman every eighteen seconds. Mordini, Note, 52 DRAKE L. REV. at 296.

Estimates of domestic violence incidents range from 572,000 to four million per year in the United States, with the disparity

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[12] No further analysis is necessary. If the Confrontation Clause does not bar non-testimonial hearsay, then there was no Sixth Amendment violation in admitting the statements into evidence. If *Ohio v. Roberts*, 448 U.S. 56 (1980), continues as the Confrontation Clause guardian against non-testimonial hearsay, then there was no Sixth Amendment violation, because the statements were excited utterances. *See White v. Illinois*, 502 U.S. 346 (1992).

attributed to the type of behavior targeted, ranging from assaults with little or no physical injury to assaults with serious injury or hospitalization. *Id.* "The most conservative estimates report that women are physically abused in 12% of all marriages. Other studies have estimated that as many as 50% or more of all women will be victimized at some point in their lives." *Id.* The 2000 National Violence Against Women Survey showed that 25% of women are subjected to violence by an intimate partner during their lifetime. Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOKLYN L. REV. 311, 326. "[A] large amount of intimate partner victimizations are not reported to the police. Some claim that as much [as] 50% of domestic violence goes unreported." *Id.*

> Those numbers are reflected in Texas, as well.
>
> The Texas Council on Family Violence (TCFV) and the Texas Department of Public Safety report that there were 185, 299 family violence incidents reported to law enforcement . . . in 2003 alone. [A 2002 TCFV statewide poll showed that] [f]orty-seven percent of all Texans acknowledged having personally experienced at least one form of domestic violence . . .. Finally, TCFV found that thirty-one percent of all Texans report they have been severely abused at some point in their lifetime.

Donna D. Bloom, Comment, *"Utter Excitement" about Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 726-27.

> Domestic violence impacts this country economically, also.
>
> The sheer volume of domestic violence crime is shocking. Statistics from varied sources reveal the enormity and scope of the domestic violence epidemic. Domestic violence imposes a staggering financial burden on society. The

> economic cost of battering relationships to employers is between five and ten billion dollars per year. Also, substantial health care resources are devoted to domestic violence. The Surgeon General reports that violence against women is the leading cause of injury to American women.

Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUMBIA J. GENDER & L. 1, 33.

B. Lack of Cooperation of Domestic Violence Victims

> Compounding the seriousness of the problem, domestic violence is widely regarded as one of the most difficult types of crimes to investigate and prosecute. Because physical abuse typically occurs inside the home, rather than in public, the victim and the victim's children are often the only witnesses to the crime. Consequently, the prosecution's case typically relies heavily on the victim testifying. But getting victims to testify can be a monumental challenge. Most jurisdictions report that in the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution. Some jurisdictions report withdrawal rates as high as ninety-six percent. Unfortunately, the victim's failure to cooperate or testify often leads to dismissal of the case.

Percival, Note, 79 S. CAL. L. REV. at 235-36.

"Non-cooperation by [victim] recantation or failure to appear at trial is an epidemic in domestic violence cases." Beloof & Shapiro, 11 COLUMBIA J. GENDER & L. at 3. Approximately 80% of domestic violence victims either recant or refuse to cooperate at

trial. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1363-64 ; *see also* Bloom, Comment, 36 ST. MARY'S L.J. at 728 n.50 (domestic violence victims refuse to cooperate at trial up to 80% of the time).

Victim non-cooperation leads to case dismissals. During the summer of 2004, one-half of the domestic violence cases set for trial in Dallas County, Texas, which is where the present case is from, were dismissed because of evidentiary problems under *Crawford.* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50. Dallas County judges were dismissing up to a dozen domestic violence cases per day. *Id.* at 772-73. Even before this Court's decision in *Crawford*, the most common reason for dismissing domestic violence cases in Brooklyn and Milwaukee was the victims' failure to appear in court or to testify against defendants. *Id.* at 769.

The lack of victim cooperation and the desire to more aggressively pursue domestic violence prosecutions led many prosecutor offices to adopt no-drop policies for domestic violence cases, whereby prosecutor offices deny victims the option of withdrawing complaints. *See generally* Angela Corilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853.

Prosecutors rely heavily on excited utterances to prove a family violence crime when the victim does not appear at trial. Bloom, Comment, 36 ST. MARY'S L.J. at 731. Without such a statement, the prosecutor is unlikely to be able to prosecute such a case when the victim does not cooperate. *Id.*

Crawford's biggest impact will likely be in domestic violence and child abuse cases, in which victims do not always come to the court. Lininger, 91 VA. L. REV. at 750 n.50. A survey of prosecutors in three states showed that prior to *Crawford* they relied

on hearsay in more than one-half of their domestic violence prosecutions. *Id.* at 771. Prosecutors indicate that after *Crawford*, they are more likely to drop domestic violence charges when the victim recants or refuses to cooperate. *Id.* at 750.

> Some critics worry that the challenges *Crawford* created will be the last straw in an area of law that was already so difficult to prosecute, resulting in prosecutors making domestic violence even less of a priority. Compounding the problem, when prosecution success rates decrease, law enforcement officers lose their motivation to target domestic violence ardently, as it becomes more and more evident that their efforts do not translate into more batterers being prosecuted.

Percival, Note, 79 S. CAL. L. REV. at 239.[13]

The issue in this case, like the issue in *Hammon* and *Davis*, provide this Court with the opportunity to clarify a difficult area of federal constitutional law that has powerful and far-reaching ramifications across the country. This Court should nurture this aspect of Confrontation Clause jurisprudence through its infancy and supply much needed guidance by granting this petition and addressing the common fact-pattern presented in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari.

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[13] The State is not suggesting that *Crawford* was incorrectly decided. The State is simply pointing out the importance of the issue presented in this case and its impact on a vast number of cases nationwide, in support of the argument that this Court should grant this petition to provide further guidance in this area.

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APPENDIX

In The Court of Appeals
Fifth District Court of Texas

No. 05-04-00451-CR

JETT. J. MASON, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 10
Dallas County, Texas
Trial Court Cause No. MA02-45615-L
Opinion issued June 30, 2005

OPINION

Before Justices Moseley, Francis, and Lagarde [Footnote 1]

A jury convicted Jett J. Mason, Jr. of misdemeanor assault and assessed his punishment at confinement in the Dallas County jail for one day. *See* TEX. PEN. CODE ANN. § 22.01(a)(1), (b) (Vernon Supp. 2004-05). Following the jury's recommendation, the trial court suspended imposition of the sentence and placed appellant on community supervision for six months. [Footnote 2] The issue we must decide in this appeal is whether the non-testifying complainant's out-of-court statements to the police officer who responded to her 911 call were testimonial in nature. We hold they

were testimonial. We further hold that the trial court erred in admitting the statements in violation of the Confrontation Clause, as recently interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and that appellant was harmed by their admission. Accordingly, we reverse the trial court's judgment and remand for further proceedings.

Facts & Procedural Background

Donald Blasingame, a patrol sergeant with the Seagoville Police Department, and the State's only witness at trial, testified that on July 6, 2002, he responded to a 911 disturbance call at a Seagoville residence. When Blasingame arrived, the complainant, who was upset, crying, and angry, answered the door. In response to Blasingame's question about why she called the police, the complainant said that she and her boyfriend, later identified as appellant, had been sleeping when his cellular telephone rang. When the complainant woke appellant up to answer the telephone, he slapped her on the face, shoved her off the bed, put his hand on her throat, and told her he was going to kill her. Blasingame observed red marks and swelling around the complainant's mouth and nose, which were consistent with her statements.

Blasingame also spoke to appellant. Appellant told Blasingame that he accidentally hit the complainant when he reached over to get the telephone. Disbelieving appellant's version, Blasingame arrested appellant based on the complainant's oral statements and his observations at the scene.

The complainant did not appear at trial. [Footnote 3] The State sought to prove its case through Blasingame's hearsay testimony of the complainant's oral statements made to him at the scene. [Footnote 4] Appellant objected to the out-of-court statements on both hearsay and Confrontation Clause grounds. [Footnote 5] Following a pretrial hearing outside the jury's presence, the trial court ruled the complainant's out-of-court oral

statements to Blasingame were admissible.

Arguments on Appeal

On appeal, appellant asserts only that the admission of the complainant's out-of-court statements violated the Confrontation Clause of the Sixth Amendment. Appellant does not challenge the trial court's ruling on hearsay grounds. Relying on *Crawford*, appellant argues that the complainant's statements were testimonial because they were made in response to "interrogation." Appellant further asserts that the statements were inadmissible because the State did not show the complainant was unavailable or that appellant had a prior opportunity to cross- examine her. Appellant contends that by its use in *Crawford* of the term "interrogation" in its colloquial sense, the Supreme Court sought to broaden the term "interrogation" to ensure the protections of the Sixth Amendment were not circumvented or limited unnecessarily. Thus, appellant argues, in determining whether there was "interrogation," the focus should be on why the questions were asked, and whether the answers "bear testimony," not on where or how the questioning occurred. *See Crawford*, 541 U.S. at 51 (Confrontation Clause applies to "witnesses" against the accused, in other words, those who "bear testimony"). Appellant contends that if a question is asked to gain information from a witness pursuant to an investigation of a criminal offense, interrogation has taken place.

Alternatively, appellant contends that even if the complainant's out-of-court statements were not obtained through interrogation, they are still testimonial because she "reasonably had to expect these statements would be used in a subsequent prosecution against [appellant]." *See Crawford*, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers, et al. as *Amici Curiae* 3, which argued that included within the class of "testimonial" statements are "statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial").

The State responds that the complainant's out-of-court statements were not testimonial because they were made "in the initial phase of the investigation when the officer was trying to figure out what happened," they were not the product of a police interrogation, and they were not made under "circumstances conducive to contemplation of future legal proceedings" that would render them testimonial. The State first notes appellant does not contest the trial court's determination that the complainant's statements qualified as excited utterances. The State recites the definition of an excited utterance under Texas law, *i.e.*, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2). The State then calls our attention to language in *Crawford* that statements made out of impulse are not usually accompanied by an awareness on the part of the declarant that she is "bear[ing] testimony" against another. *See Crawford*, 541 U.S. at 51. The State argues that because the complainant in this case was "extremely upset and visibly injured" when she made the statements, it is not reasonable to expect that she contemplated her out-of-court statements would be used at a later trial. Rather, the State asserts, it is more reasonable to presume the complainant was concerned only with her immediate safety. The State concludes the complainant's out-of-court statements describing the assault were not "testimonial" in nature, were admissible under the excited-utterance exception to the hearsay rule, and, thus, their admission did not violate the Confrontation Clause.

To the extent the State argues that the test for determining whether the witness is "bearing testimony" is a subjective, not an objective, one, and that, by definition, an "excited utterance" is not testimonial, we disagree.

Pre- and Post-Crawford Law

Before *Crawford*, hearsay statements were admissible for purposes of the Confrontation Clause if they possessed adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, however, the Supreme Court abrogated the *Roberts* "indicia of reliability" test, holding that without regard to their reliability, testimonial out-of-court statements by a witness are barred by the Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *See Crawford*, 541 U.S. at 68. The Supreme Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Testimonial or Non-testimonial

Leaving for another day any effort to spell out a comprehensive definition of "testimonial," the Supreme Court acknowledged that its refusal to articulate a comprehensive definition would cause interim uncertainty. *Id.* at 68 & n.10. Indeed, the Court was correct. Some guidance, however, can be found within the *Crawford* opinion. The term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The Court used the term "interrogation" in its colloquial, rather than any technical, legal sense. *See id.* at 53 n.4 (comparing *Crawford* facts to *Rhode Island v. Innis*, 446 U.S. 291 (1980)). "Testimony" is typically "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Included within the class of "testimonial" statements are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would

be available for use at a later trial." *Id.* (emphasis added).

In *Crawford's* wake, various courts, both in and out of Texas, have expressed opinions about what constitutes a "testimonial" statement. In *Lee v. State*, 143 S.W.3d 565, 570-71 (Tex. App.-Dallas 2004, pet. ref'd), this Court held that a non-testifying codefendant's out-of-court statement to a police officer was testimonial. The statements in *Lee* were made during a traffic stop, in response to police questioning, regarding the offense for which the defendant had already been arrested, and were recorded on the patrol car's audio-video equipment. *Id.* at 570. This Court concluded that "the formality of the setting . . . was intended to record testimony for the prosecution of the case being investigated." *Id.*

The State cites several Texas cases that have emphasized the formality of the circumstances surrounding the police questioning as indicating the declarant's expectation that the statements would be used in a criminal prosecution. *See, e.g., Brooks v. State*, 132 S.W.3d 702, 707 (Tex. App.-Dallas 2004, pet. ref'd) (holding non-testifying codefendant's written custodial statement made during investigation of charged crime was testimonial); *Gutierrez v. State*, 150 S.W.3d 827, 830 (Tex. App.-Houston [14th Dist.] 2004, no pet.) (op. on remand) (holding accomplice's videotaped statement to police after defendant's arrest was testimonial); *Samarron v. State*, 150 S.W.3d 701, 707 (Tex. App.-San Antonio 2004, pet. ref'd) (holding witness's formal, signed, written statement to police was testimonial). In contrast, the State asserts that the record in this case does not support appellant's contention that Blasingame's inquiry into the reason he had been summoned amounted to an "interrogation" in contemplation of a potential criminal prosecution. The State argues that Blasingame's question was simply intended to assess the situation. In support of its position, the State cites *Wilson v. State*, 151 S.W.3d 694, 698 (Tex. App.-Fort Worth 2004, no pet.) (holding there was no interrogation when witness initiated contact with police and police were

questioning witness to determine why she was upset and not to elicit information about known criminal activity); and *Gonzalez v. State*, 155 S.W.3d 603, 609 n.4 (Tex. App.-San Antonio 2004, pet. stricken) (expressing doubt that investigatory questioning immediately after crime has been committed rises to the level of "interrogation"); *see also Key v. State*, No. 12-04-00030-CR, 2005 WL 467167 (Tex. App.-Tyler Feb. 28, 2005, pet. filed) (holding statements made by complainant to police officer responding to disturbance call not testimonial). [Footnote 6] *Key* is distinguishable. In *Key*, the complainant neither called the police nor initiated contact with the police. *Key*, No. 12-04-00030-CR at *5. [Footnote 7] At trial, the testifying officer did not explain whether the complainant's statements were spontaneous or in response to questions.

The State also cites cases from several other states and two federal circuit courts that have held, under *Crawford*, inquiries by police officers responding to a 911 or other call about the purpose of the call are not testimonial. *See, e.g., Mungo v. Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004), *cert. denied sub nom. Mungo v. Greene*, 2005 WL 429805 (Apr. 25, 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2540 (2005); *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Ct. App. 2004), *review granted*, 105 P.2d 114 (Cal. 2005); *People v. Corella*, 18 Cal. Rptr. 3d 770 (Ct. App. 2004); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005, appeal pending); *Rogers v. State*, 814 N.E.2d 695 (Ind. Ct. App. 2004); *Fowler v. State*, 809 N.E.2d 960, 964-65 (Ind. Ct. App. 2004), *vacated*, 2005 WL 1405937 (Ind. June 16, 2005); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *vacated*, 2005 WL 1406007 (Ind. June 16, 2005); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *People v. Bryant*, No. 247039, 2004 WL 2881115 (Mich. Ct. App. Aug. 24, 2004) (not designated for publication); *State v. Wright*, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004, review granted); *People v. Mackey*, 785 N.Y.S.2d 870 (N.Y.

Crim. Ct. 2004).

The State also acknowledges that courts in other jurisdictions have held to the contrary. *See Lopez v. State*, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004); *Pitts v. State*, No. A04A1621, 2005 WL 127049 (Ga. Ct. App. Jan. 24, 2005); *People v. Victors*, 819 N.E.2d 311 (Ill. App. Ct. 2004, appeal denied). These courts seem to focus on whether the statements in question were made under circumstances indicating the complainant knew he or she was making a police complaint and that what was said could be used against the defendant.

We understand the State's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future legal proceedings. We cannot agree. Moreover, even if we were to assume the State is correct in such premise, we nevertheless conclude, based on *Crawford* itself, that subjective contemplation is irrelevant to an analysis of whether such out-of-court statements would be testimonial or non-testimonial. First, the test set out in *Crawford* is objective, not subjective. Second, even if the test were subjective, the declarant's perception could be determined only through cross-examination. *Crawford* identifies as testimonial "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52 (emphasis added). And, in criticizing the application of the Roberts reliability test, the Court stated,

> [t]he Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her

situation. Only cross-examination could reveal that.

Id. at 66. Thus, even if the test were subjective, under *Crawford*, only cross-examination could reveal the complainant's subjective perception of her situation. *See id.*

Definitions of "Interrogation"

Not Interchangeable under Fifth and Sixth Amendments

In *Rhode Island v. Innis*, the Supreme Court addressed for the first time the meaning of "interrogation" under *Miranda v. Arizona*. [Footnote 8] *See Innis*, 446 U.S. at 291. The *Innis* Court was concerned with the Fifth Amendment privilege against compulsory self-incrimination when it held that other techniques of persuasion beyond express questioning could constitute "interrogation." *See id.* at 300-01. However, the Supreme Court excluded from the definition of "interrogation" any words or actions on the part of the police that were normally attendant to arrest and custody. *See id.* at 300. In *Innis*, however, it is clear the Supreme Court was not considering "interrogation" within the meaning of the Sixth Amendment as reflected by the following language: "The definitions of 'interrogation' under the Fifth and Sixth Amendments, *if indeed the term 'interrogation' is even apt in the Sixth Amendment context*, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." *Id.* n.4 (emphasis added). Therefore, to the extent courts have seemingly used the Innis exclusion from "interrogation" under the Fifth Amendment, *i.e.*, "police words or actions normally attendant to arrest and custody," in determining what is "interrogation," and thus testimonial, we decline to follow their rationale. Such an application would not serve the policies underlying the Sixth Amendment as expressed in *Crawford*. *See Crawford*, 541 U.S. at 61 (goal of Sixth Amendment to ensure reliability of evidence and that reliability be assessed by crucible of cross-examination).

Application

It is undisputed that the complainant's out-of-court statements were admitted as substantive evidence for the truth of the matter asserted. The Confrontation Clause does not bar the use of *testimonial statements for purposes other than establishing the truth of the matter asserted. See* Crawford, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). As proponent of the out-of-court statements, the State had the burden to show their admissibility-that is, to show either that the statements were non-testimonial or, if testimonial, that the complainant was unavailable and appellant had been afforded a prior opportunity to cross-examine her. *See id.* at 68. Except for the prosecutor's statement that she did not believe the complainant had been served with a subpoena, the record is silent as to the unavailability of the complainant, and the State presented no evidence that appellant had been afforded a prior opportunity to cross-examine her. Therefore, admission of the statements would not violate the Confrontation Clause only if they were not testimonial.

For the reasons set out above, we conclude the complainant's out-of-court oral statements resulted from an "interrogation" within the meaning of the Sixth Amendment. Thus, the statements were testimonial. Moreover, even if the complainant's out-of-court oral statements were not in response to "interrogation," we nevertheless conclude they were testimonial because they were "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *See id.* at 52.

Because the complainant's out-of-court statements were testimonial and the State did not carry its burden of showing she was unavailable and that appellant had a prior opportunity to cross-examine her, the trial court erred in admitting the out-of-court statements. See id. at 68.

Moreover, because the error was constitutional, we must reverse unless we can conclude beyond a reasonable doubt the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2(a). The complainant's out-of-court statements were the only substantive evidence that appellant intentionally hit her. Without them, the State would have had no case. Thus, it is obvious the trial court's error contributed to the conviction. *See Lee*, 143 S.W.3d at 571. We resolve appellant's issue in his favor.

We reverse the trial court's judgment and remand the case for further proceedings.

SUE LAGARDE

JUSTICE, ASSIGNED

Publish

Tex. R. App. P. 47

Footnote 1 The Honorable Sue Lagarde, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

Footnote 2 Appellant's community supervision expired on September 11, 2004, absent the filing of a motion to revoke.

Footnote 3 The record reflects appellant and the complainant were still together at the time of trial.

Footnote 4 The complainant also gave a written statement. The written statement, however, was neither offered nor admitted into evidence for any purpose, nor does it otherwise appear in the record before us.

Footnote 5 The State argued in the trial court that the complainant's statements were admissible under the excited-utterance exception to the hearsay rule, *see* TEX. R. EVID. 802, 803(2), and as either a statement by a party-opponent or under the hearsay exception for statements against interest. *See* TEX. R. EVID. 801(e)(2), 803(24); *see also* TEX. R. EVID. 805. The State also contended at trial, and on appeal, that the statements were non-testimonial.

Footnote 6 The briefs in this case were filed before the *Key* opinion issued, so neither party cited the *Key* case.

Footnote 7 The opinion states only that when the testifying officer answered a disturbance call one night, he walked in the area to determine where the noise came from, heard screaming that he described as an "unusual" "large emotional" disturbance, and found appellant and the complainant sitting outside on the ground, arguing.

Footnote 8 384 U.S. 436 (1966).

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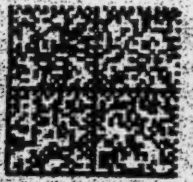

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On this day, the State's petition for discretionary review has been refused.

JUDGE MEYERS WOULD GRANT.

Louise Pearson, Clerk

AK

District Attorney Dallas County
Attn: Lori Ordiway
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Dallas, TX 75207

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No. 05-1435

Supreme Court, U.S.
FILED
JUL 27 2006
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In The

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

JETT J. MASON, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Fifth District Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether a statement made in response to police interrogation, the primary purpose of which was to establish or prove past events potentially relevant to a later criminal prosecution, was testimonial?

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BRIEF IN OPPOSITION

The respondent, Jett Jarvis Mason, Jr. ("Mason"), submits this brief in opposition to the State of Texas' ("SOT") petition for a writ of certiorari.

OPINION BELOW

Mason does not object to the SOT recitation of the court proceedings below.

COUNTER-STATEMENT OF THE CASE

A. The Alleged Assault

On July 6, 2002, at 7:24 p.m., Sergeant Donald Blasingame, a police officer with the Seagoville Police Department, and the State's sole witness at trial, received a dispatch and responded to a 911 disturbance call at a residence in Seagoville, Texas. Blasingame knocked on the door of the residence and Sarah Henderson answered the door. Blasingame described Henderson's demeanor as upset, crying and mad; he noted redness and the beginning of swelling around Henderson's nose and mouth. (RR 2 p. 10)[1] In response to Blasingame's question about why she had called the police, Henderson, who did not testify at the trial, told Blasingame she and Mason were asleep when Mason's cell phone began ringing. When Henderson woke Mason to answer the phone, he slapped her. Henderson told Mason, "You slapped me." Mason then shoved her

[1] RR refers to the Reporter's Record of transcribed trial proceedings followed by the volume number, page number and line numbers.

off the bed, put his hand on her neck and said he would kill her. Henderson told Mason she was calling the police and did so[2]. (RR 2 p. 11)

In response to police questioning, Henderson told Blasingame she and Mason had not been arguing or fighting before the alleged assault (RR 2 p. 51) and had been getting along okay. (RR 2 p. 24) Further, Blasingame did not observe blood, torn clothing or any signs of a struggle inside the home. (RR 2 p. 42)

After questioning Henderson, Blasingame questioned Mason in the bedroom. He found Mason sitting on the bed and appearing to have been asleep. (RR 2 p. 43) Blasingame questioned Mason about the events of the evening (RR 2 p. 14); Mason told Blasingame he had accidentally hit Henderson when he reached for the phone. (RR 2 p. 37-38) Mason was arrested at 7:37 p.m. and charged with misdemeanor family violence assault.

REASONS TO DENY THE PETITION

I. This Case Does Not Merit Certiorari Because The State Court Decided An Important Federal Question That Has Since Been Settled By This Court.

The Court exercises its discretion to grant certiorari only when a state court has decided an important federal question that has not been, but should be, settled by this Court. Sup. Ct. Rule 10(c). Because the issues in question

[2] There was no evidence of the content of the 911 call introduced at trial other than such a call was made.

were decided by this Court after the SOT filed its writ of certiorari, no legal issue is presented worthy of certiorari.

A. *Crawford v. Washington*[3]

Mason is a domestic violence case in which the complainant did not testify. Because many complainants in domestic violence cases refuse to cooperate with prosecutors, or recant their previous, inculpatory statements, prosecutors, through the use of the excited utterance exception to the hearsay rule[4] and ***Ohio v. Roberts***[5], fashioned a "victim-less" prosecution. ***Davis v. State***, 169 S.W.3d 660, 671 (Tex.App. – Austin 2005, *no pet.*) *citing* ***People v. Moscat***, 3 Misc.3d 739, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Court 2004)

The approach proliferated throughout the country. The ***Roberts*** application allowed the admission of testimonial statements through a third party, no personal knowledge of the events to which they testified, without an opportunity by a criminal defendant to test the reliability of the statements through cross-examination. Many times, as is the case here, the testimony admitted as an excited utterance was the ***only*** testimony concerning the elements of the charged offense.

Crawford overruled ***Roberts*** with regard to testimonial statements and stated:

> **"We readily concede that we could resolve this case by simply reweighing the "reliability**

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[3] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

[4] 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)

[5] **TEX.R.EVID. 803(2)**

> **factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion ... The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising."**

Crawford v. Washington, 124 S.Ct. at 1373.

The ***Crawford*** Court reached two conclusions about the meaning of the **Sixth Amendment**: (1) the Court noted the principal evil at which the Confrontation Clause was directed was the civil law use of ex parte examinations as evidence against the accused. ***Crawford v. Washington,*** 124 S.Ct. at 1363; and (2) the Framer's of the Constitution would not have allowed admission of testimonial statements of a witness into evidence who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity to cross-examine the witness. ***Crawford v. Washington,*** 124 S.Ct. at 1365. The Court noted the unpardonable vice of the ***Roberts*** test was its demonstrated capacity to admit core testimonial statements the Confrontation Clause plainly meant to exclude. ***Crawford v. Washington,*** 124 S.Ct. at 1372.

The core holding of ***Crawford*** is that the Confrontation Clause of the **Sixth Amendment** is a rule of procedure, not of evidence. If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers

a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements. ***United States v. Cromer***, 389 F.3d 662, 679 (6th Cir. 2004).

With these principles in mind, the ***Crawford*** Court stated the Confrontation Clause applies to witnesses against the accused – in other words, those who bear testimony[6] – and set out a non-exhaustive list of what, at a minimum, are testimonial statements: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford v. Washington,*** 124 S.Ct. at 1364. Statements taken by police officers in the course of interrogations are also testimonial. ***Id.***

Crawford did not specifically define interrogation in the **Sixth Amendment** context but the Court did explain explicitly what it is not. The Court used the term "interrogation" in its colloquial[7], rather than any technical, legal sense. ***Mason v. State***, 173 S.W.3d 105, 108 (Tex.App. –

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[6] ***Crawford v. Washington***, 124 S.Ct. at 1364.

[7] Colloquial means "used in or characteristic of conversation, especially familiar and informal conversation." ***Lee v. State***, 143 S.W.3d 565 (Tex.App. – Dallas 2004, *pet. ref'd*) *citing* **WEBSTER'S THIRD NEW INT'L DICTIONARY 446 (1981)**

Dallas 2005, *pet. ref'd*) *citing* ***Crawford v. Washington***, 541 U.S. at 53 n.4 (comparing ***Crawford*** facts to ***Rhode Island v. Innis***, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980))

Also included within the class of testimonial statements are statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. ***Crawford v. Washington***, 124 S.Ct. at 1364. The Court explained:

> **"It applies to "witnesses" against the accused – in other words, those who bear testimony. 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony", in turn is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact". *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."**

Id. at 1364.

After ***Crawford***, lower courts set about the task of determining whether out-of-court statements were testimonial. A majority view emerged, (which the SOT advances before this court), which held that statements obtained during the initial police-complainant interaction at the scene of a crime were not testimonial for purposes of

the **Sixth Amendment** even if the statements were made in response to police questioning[8].

B. *Hammon v. Indiana*[9] and *Davis v. Washington*[10]

On June 19, 2006, the Court issued its opinion in ***Hammon*** and ***Davis*** deciding when statements made to law enforcement personnel at a crime scene, and during a 911 emergency call, are testimonial and thus subject to the requirements of the **Sixth Amendment**'s Confrontation Clause. This Court held:

> **"Statements are nontestimonial when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and**

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[8] *See, e.g.*, ***Mungo v. Duncan***, 393 F.3d 327, 336 n.8 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1936 (2005); ***Leavitt v. Arave***, 383 F.3d 809, 830 n.22 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2540 (2005); ***Anderson v. State***, 111 P.3d 350, 354-55 (Alaska Ct.App. 2005); ***People v. Corella***, 18 Cal. Rptr. 3d 770, 776 (Cal.Ct.Rptr. 2004); ***State v. Green***, 874 A.2d 750, 775-76 (Conn. 2005); ***People v. West***, 823 N.E. 2d 28, 36-37 (Ill.App.Ct. 2005); ***Rogers v. State***, 814 N.E.2d 695, 701-02 (Ind.Ct.App. 2004); ***State v. Hembrett***, 696 N.W.2d 473, 269 Neb. 840, 851-52 (Neb. 2005); ***People v. Mackey***, 785 N.Y.2d 870, 873-74 (N.Y. Crim.Ct. 2004). *But see* ***United States v. Arnold***, 410 F.3d 895, 904 (6th Cir. 2005); ***Lopez v. State***, 888 So.2d 693, 700 (Fla.Dist.App. 2004); ***Moody v. State***, 594 S.E.2d 350, 354 n.6 (Ga. 2004); ***Pitts v. State***, 612 S.E.2d 1, 5 (Ga.Ct.App. 2005); ***People v. Victors***, 819 N.E.2d 311, 320-21 (Ill.App.Ct. 2004), *appeal denied*, 830 N.E.2d 8 (Ill. 2005); ***State v. Byrd***, 828 N.E.2d 133, 137 (Ohio Ct. App. 2005)

[9] No. 05-5705

[10] No. 05-5224

> **that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."**

Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006).

The Court noted its holding refers to interrogations because the statements in ***Hammon*** and ***Davis*** were the product of interrogations; however, the Court expressly recognized that the absence of interrogation does not necessarily mean statements are non-testimonial. The emphasis of the inquiry into whether statements are testimonial, are the statements themselves, not the interrogator's questions. ***Davis v. Washington***, 126 S.Ct. at 2274 n.1. The Court explained that the Confrontation Clause operates to bar only those statements obtained during police interrogations that are "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." ***Davis v. Washington***, 126 S.Ct. at 2276.

1. The *Davis* Case

The complainant (Michelle McCottrey), in ***Davis*** placed a 911 emergency call during an ongoing domestic dispute[11]. After providing identifying information concerning the perpetrator (Adrian Davis), Michelle told the

[11] The ongoing nature of the dispute was objectively apparent from Michelle's present tense description of the dispute. When the 911 operator asked "What's going on?" the caller replied, "He's here jumpin' on me again," and when asked by the operator if there were any weapons involved, the caller replied, "No. He's usin' his fists." As the call continued, the caller stated, "Martel. He's runnin' now." ***Davis v. Washington***, 126 S.Ct. at 2271-72

operator Adrian had "just run out the door" after hitting her and was leaving in a car with another person. ***Davis v. Washington***, 126 S.Ct. at 2272. When the police arrived, they observed Michelle had injuries which appeared to be fresh, was in a shaken state and frantically gathering her belongings and children in order to leave the residence. ***Id.***

In finding the statements made to the 911 operator to be non-testimonial, the Court noted the contrast between Michelle's interrogation by the 911 operator and Sylvia Crawford's interrogation. It was objectively apparent Michelle was involved in an ongoing dispute and describing events as they were actually happening. By contrast, Sylvia's interrogation took place hours after the events she described had occurred. Michelle's statements, objectively viewed, contained necessary information to resolve an ongoing emergency rather than to simply learn what had happened in the past[12]. Sylvia's statements, by contrast, recounted past events. The Court noted the formality of Sylvia's interrogation at the police station, consisting of calm responses to the interrogating questions while the interrogator was taping and making notes of the answers, contrasted with the caller's frantic answers provided over the phone in an environment that was not safe. ***Davis v. Washington***, 126 S.Ct. at 2276-77. These factors compelled the Court to conclude Michelle's interrogation objectively demonstrated her statements were a call for

[12] The Court characterized the inquiries by the operator, and Michelle's answers, concerning the perpetrator's identity as information necessary to resolve the emergency, i.e. non-testimonial, so that the responding officers would know if they were going to be confronting a violent felon upon arrival. ***Davis v. Washington***, 126 S.Ct. at 2277 *citing* ***Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.***, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)

help to meet the ongoing emergency. The Court stated Michelle was not acting as a witness, nor testifying, and what she said was not a weaker substitute for live testimony. ***Davis v. Washington***, 126 S.Ct. at 2277 *citing* ***United States v. Inadi***, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986).

The Court further clarified that an interrogation that begins as an emergency call for help can "evolve" into procured answers that are testimonial in nature once that emergency has ended, *e.g.* when Adrian left the house. ***Davis v. Washington***, 126 S.Ct. at 2277.

2. The *Hammon* Case

The Count found the determination of the nature of the statements obtained in ***Hammon*** through interrogation was a "much easier task." ***Davis v. Washington***, 126 S.Ct. at 2278. In ***Hammon***, police responded to a domestic disturbance involving Amy and Herschel Hammon. Upon arrival, the police found Amy alone, sitting on the porch appearing "somewhat frightened;" Amy told the responding officers nothing was the matter and gave them permission to enter the home. ***Hammon v. Indiana***, 829 N.E.2d 444, 446-47 (Ind. 2005). After entering the home, the police observed a damaged gas heating unit emitting flames from the front of the unit. Hershel was found in the kitchen and told the officers he and his wife had an argument, everything was fine now and the argument had never become physical. ***Id.*** at 447 The officers spoke separately with Amy and Hershel in separate rooms and prevented Hershel from being present when Amy was interrogated. Amy told the officer Hershel had broken the furnace, lamps and phone, shoved her into the glass from the

broken furnace, threw her down, tore up her van to prevent her from leaving, hit her in the chest, and attacked her daughter; she provided a written account of these events to the officer at his request. ***Davis v. Washington***, 126 S.Ct. at 2272.

The Court held the circumstances were objectively clear that the interrogation was part of an investigation into possible criminal past conduct. The officers admitted they were conducting an investigation, there was no immediate emergency in progress, there was no evidence the officers heard crashing or arguing when they arrived and saw no one throw or break anything. ***Id***. Amy's interrogation consisted of questions concerning what happened, not what was happening. Although Amy's interrogation was not as formal as the ***Crawford*** interrogation, the formality of Sylvia's interrogation merely strengthened the testimonial aspects of her statements; however, formality was not essential to the point. The Court concluded it was formal enough that Amy's interrogation was conducted separate and apart from Hershel with the officer asking questions for use in his investigation. ***Davis v. Washington***, 126 S.Ct. at 2272.

Objective facts relied upon to show the testimonial nature of Amy's statements given in response to interrogation included the active separation of Amy and Hershel during the interrogation; Amy "deliberately" recounting what had happened that evening in response to police questioning, and the interrogation producing the statements taking place after the events had already occurred. ***Id.*** These statements were an obvious substitute for live testimony because they do precisely what a witness does on direct examination and are inherently testimonial. ***Davis v. Washington***, 126 S.Ct. at 2278. The Court

further found sufficient formality was present in that lies to officers concerning alleged crimes are criminal offenses[13]. ***Davis v. Washington***, 126 S.Ct. at 2278 n.5

The Court did not hold that all questions at the scene of a crime will yield testimonial statements; it specifically excluded statements containing information which concerns the safety of the officers, such as whom they are dealing with, in order to assess the situation and possible danger to a potential victim. These types of exigencies may mean that "initial inquiries" produce non-testimonial statements; however, where the statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. ***Id.*** at 2279

C. The SOT Contentions

The SOT contends its petition for writ of certiorari (PWOC p. 12)[14] should be granted for the following reasons: (1) this Court has granted certiorari in similar cases, namely, ***Davis*** and ***Hammon*** (PWOC p. 6-12); (2) the state court of appeals failed to apply the objective witness test set out in ***Crawford*** to the circumstances

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[13] **TEXAS PENAL CODE sec. 37.08 False Report to Peace Officer or Law Enforcement Employee** "(a) A person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to: (1) a peace officer conducting the investigation; or (2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation . . . "

[14] "PWOC" refers to the petition for writ of certiorari followed by the page number(s).

surrounding the procurement of the statements in this case (PWOC p. 12-13); (3) the state court erred in finding the statements in this case were testimonial (PWOC p. 13-26); and, (4) because the issues in this case compel further guidance from this Court (PWOC p. 26-30).

The ***Davis*** opinion was issued after the SOT had filed its PWOC; therefore, the cases cited in the SOT PWOC in support of their position are pre-***Davis*** and provide little support for the SOT contentions. This Court considered the SOT contentions in ***Davis*** and ***Hammon*** and decided the issues therefore, no legal issue is presented worthy of certiorari.

1. The Procured Statements In *Mason* Are Testimonial Because They Were Obtained During An Interrogation By A Police Officer And Recounted Past Events

The SOT asserts that whether an interrogation has taken place is dependent upon the number of questions asked by a government official, when the questions are asked and whether the questions were asked with "some degree of focus or concentrated purpose in a formal, solemn, systematic, or thorough manner, seeking details about a specific subject manner . . . that is being investigated." (PWOC p. 16) The SOT asserts one question, during the "initial, preliminary phase" of an investigation, does not amount to interrogation. (PWOC p. 16)

Because the SOT did not have the benefit of the guidance provided in ***Davis***, its focus is misplaced. Under ***Davis*** and ***Hammon***, statements made in the absence of any interrogation may be testimonial, ***Davis v. Washington***, 126 S.Ct. at 2273-74 n.1, while other statements made in

response to police questioning may be non-testimonial[15]. The focus of the inquiry is twofold: first, is the purpose of the interrogation solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator? If so, the product of such an interrogation, whether reduced to writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. ***Davis v. Washington***, 126 S.Ct. at 2276. Second, were the declarant's statements made while the events being described were actually happening or was the declarant describing past events? ***Id.*** If the declarant is speaking about events as they occur[16] during an ongoing emergency, and the statements elicited contained information necessary to resolve the ongoing emergency, then the product of the interrogation is non-testimonial. Therefore, it is the nature and content of the statements, not the questions asked, that is central in a **Sixth Amendment** analysis. ***Davis v. Washington***, 126 S.Ct. at 2273-74 n.1 With this focus in mind, the Court noted it is immaterial to the analysis whether the statements are elicited during the initial inquiries of government officials at the crime scene[17]. ***Davis v. Washington***, 126 S.Ct. at 2280.

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[15] *See* ***Davis v. Washington***, 126 S.Ct. at 2279: **"Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, *see* 829 N.E.2d at 453-57, we do not hold the opposite – no questions at the scene will yield nontestimonial answers."**

[16] ***Davis v. Washington***, 126 S.Ct. at 2276 *citing* ***Lilly v. Virginia***, 527 U.S. 116, 137, 119 S.Ct. 1887, 144[L] L.Ed.2d 117 (1999) (plurality opinion)

[17] **"But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact**

(Continued on following page)

In both ***Davis*** and ***Hammon*** the questioning by the operator and the responding officers, respectively, were interrogations[18]. Reflecting the emphasis on the content of the statements in the analysis, ***Davis*** found sufficient formality in the police questioning to find interrogation in both cases and noted:

> **"The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood."**

Davis v. Washington, 126 S.Ct. at 2276 *citing* ***United States v. Stewart***, 433 F.3d 273, 288 (C.A.2 2006) (false statement made to federal investigators violate 18 U.S.C. sec. 1001); ***State v. Reed***, 2005 WI 53 prgph. 30, 280 Wis.2d 68, 695 N.W.2d 315, 323 (state criminal offense to knowingly give false information to an officer with the intent to mislead the officer in the performance of his or her duty).

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that they were given at an alleged crime scene and were initial inquiries is immaterial."

[18] The Court repeatedly refers to the questioning in both ***Davis*** and ***Hammon*** as interrogations: *See, e.g.* ***Davis v. Washington***, 126 S.Ct. at 2276 (" . . . **The question before us in *Davis*, then, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements . . . ;**" " . . . **It is entirely clear from the circumstances that [Amy's] interrogation was part of an investigation . . . ,**" ***Id.*** at 2278; **"Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations . . . ")** ***Id.*** at 2274 n.1

a. The "Cry For Help"

The SOT further contends statements made during a "cry for help" are not testimonial and argued greater flexibility is required in the prosecution of domestic violence cases due to their very nature. (PWOC p. 20-22)

Davis decided this issue. The determination is an objective analysis which examines the content of the statements to determine if the purpose of the statement(s) is to enable police assistance to meet an ongoing emergency. Factors to be considered in this inquiry include whether the statements, objectively viewed, were in the nature of a cry for help against a bona fide physical threat; however, ***Davis*** did not decide a per se "cry for help" exception to the **Sixth Amendment**[19]. ***Davis v. Washington***, 126 S.Ct. at 2276

b. Excited Utterance

Crawford held where testimonial statements are concerned, the **Sixth Amendment** protections control over the vagaries of the rules of evidence. ***Crawford v. Washington***, 124 S.Ct. at 1370. Under ***Davis***, a declarant may still be under the stress of a startling event, but, if the declarant is no longer in danger and the emergency has passed, any statements she gives could still be testimonial.

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[19] The Court noted Michelle spoke of events as they were occurring, was facing an ongoing emergency, her 911 call was a call for help against a bona fide physical threat, the nature of the questions by the operator, and Michelle's answers, were necessary to resolve the present emergency, and noted Michelle's answers were given over the phone from an unsafe environment. An objective review of the factors is applied.

If the statements are testimonial, the fact the statements fit the definition of an excited utterance does not defeat their testimonial nature. Whether a statement is an excited utterance, and therefore admissible as an exception to the hearsay rules, is not the initial inquiry. The State has the burden to show a statement is non-testimonial after timely objection by an accused. If the state meets its burden, then the State must show that the non-testimonial statement qualifies as an exception to the governing state hearsay rules[20]. To the extent the SOT argues that an excited utterance is never testimonial, that issue was decided against the SOT by ***Crawford*** and affirmed in ***Davis***.

2. The State Court Did Not Ignore The Circumstances Surrounding The Taking Of The Statements When It Found The Statements Were Made Under Circumstances Which Would Lead An Objective Witness Reasonably To Believe That The Statement Would Be Available For Use At A Later Trial

The SOT does not contest the test to be applied is an objective, not subjective, test under ***Davis*** and ***Crawford***

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[20] *But see* ***Wall v. State***, 184 S.W.3d 730, 742 (Tex.Crim.App. 2006) *citing* ***United States v. Brito***, 427 F.3d 53, 61-62 (1st Cir. 2005)

> "These parallel inquiries require an ad hoc, case-by-case approach. An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance."

in a **Sixth Amendment** analysis[21]. (PWOC p. 12-13) The SOT contends the state court of appeals applied the test incorrectly in that the state court of appeals did not take into consideration the nature of the statements given by Henderson as a cry for help through an invocation of the police community care taking or public safety function, the significance of the excited utterance, and the dynamics of domestic violence. (PWOC p. 5-6)

a. The Significance Of The Excited Utterance

The state court of appeals noted it understood the state's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future proceedings. The state court rejected the use of subjective contemplation of the complainant and deemed it irrelevant based on ***Crawford***. ***Mason v. State***, 173 S.W.3d at 110 The court further noted, even if the state were correct, the subjective contemplations of the complainant could only be uncovered by cross-examination. ***Id.***

The state court of appeals looked to various cases considering the significance of the excited utterance in reaching its holding, ***Mason v. State***, 173 S.W.3d at 109-11, and held, after objectively reviewing the facts of the case and considering the case law, the statements made in this case were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. ***Id.*** at 111-12 The ***Mason*** court did not fail to consider the

[21] ***Crawford v. Washington***, 541 U.S. at 52.

excited utterance significance, it held against the State on the issue.

As is shown in section **II.** of this Brief, the state court of appeals holding was correct.

b. The Cry For Help And The Dynamics Of Domestic Violence

The SOT, on direct appeal, did not raise either of these theories in their brief to the state court of appeals; the SOT theory was the statements in this case were excited utterances. Further, the dynamics of domestic violence is not a consideration under ***Davis***. ***Davis v. Washington***, 126 S.Ct. at 2279-80. Had the SOT raised the cry for help theory, it is doubtful it would have prevailed. As is shown in section **II** of this Brief, any immediate danger or emergency had ended when Sarah was interrogated.

The state court of appeals applied the objective test correctly[22] when it found the statements in this case were testimonial, not only as the product of interrogation, but also as statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial based on the facts of this case. ***Mason v. State***, 173 S.W.3d at 111. Because the ***Davis*** Court has clarified how the objective test is applied to determine the testimonial nature of statements and because the state court of appeals held correctly, no legal issue is presented worthy of review.

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[22] *See* section **II.** of this Brief.

II. Review Should Also Be Denied Because The Fifth District Court of Appeals Reached The Correct Result On The Facts Of The Case

A. The Lower Court Correctly Held The Statements In This Case Were The Product Of Interrogation And Were Made Under Circumstances, Objectively Considered, That Would Lead An Objective Witness To Reasonably Believe The Statement Would Be Available For Use At A Later Trial

Although the state court of appeals did not have the benefit of the ***Davis*** case when they issued their opinion, the court of appeals reached the correct conclusion. A ***Davis*** analysis of the facts of this case yields the same conclusions.

The facts of this case demonstrate the statements procured from Henderson were elicited during an interrogation conducted after any initial danger had passed. Further, the facts reveal the statements were elicited under circumstances that would cause an objective witness to reasonably believe the statements would be available for use in a subsequent prosecution. An objective view of the facts supporting these contentions are as follows:

1. Henderson spoke in the past tense about the alleged events.

2. Blasingame saw no indications of an ongoing struggle such as blood, torn clothing, loud arguing, crashing sounds, or any other signs of a struggle inside the home.

3. Mason was found in the bedroom and appeared to Blasingame to have been asleep. There is no evidence

Mason tried to prevent Henderson from calling the police, leaving the home, or answering the door when Blasingame arrived. Henderson remained in the home after the alleged assault although she had the opportunity to leave.

The record confirms the alleged assault ended before Henderson said she was calling the police[23]. Further, Henderson told Blasingame she and Mason had not been fighting or arguing before the alleged assault occurred and had been getting along okay. These facts indicate the alleged assault was of very short duration, began suddenly and ended abruptly.

4. Blasingame described Henderson's demeanor as upset, crying and mad. Persons under the immediate threat of an ongoing emergency are generally scared and fearing for their immediate safety. The emotion of anger at what has transpired generally does not occur until the person's safety is no longer at risk.

5. Blasingame admitted he was attempting to determine if an offense had *occurred*, what was going on, and why he was there. (RR 2 p. 12) He further admitted Henderson responded as to what had happened only after he asked what happened. (RR 2 p. 24)

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[23] Any statements made during the 911 call, in this case, would not be non-testimonial as in ***Davis*** because there was no ongoing emergency situation. Although the record is not clear, it is reasonable to presume Mason went back to sleep after Henderson told him she was calling the police given her statements to Blasingame and Blasingame finding Mason sitting on the edge of the bed appearing to have been asleep. Mason notes the 911 call was not offered nor admitted into evidence.

6. Henderson gave a written account of what had allegedly happened that evening to Officer Grant, a Seagoville police officer[24].

7. Blasingame interrogated Henderson and Mason separately and apart from one another.

The foregoing facts objectively show Blasingame was conducting an investigation into possible criminal past conduct as in ***Hammon***. The facts objectively show there was no emergency in progress. Objectively viewed, the sole purpose of the interrogation was to investigate a possible crime.

Henderson deliberately recounted how the alleged offense began, progressed and ended to Blasingame in response to questioning after the events had ended and gave a written statement to Grant. These statements under official interrogation are an obvious substitute for live testimony because they do precisely what a witness does on direct examination; they are therefore, inherently testimonial. *See* ***Davis v. Washington,*** 126 S.Ct. at 2278.

The statements were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. Because the statements were made after any emergency situation had ended, it is more likely Henderson contemplated the legal ramifications of her statement[25]. Henderson's statement to Mason that she was

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[24] Grant did not testify nor was the statement admitted into evidence.

[25] " . . . Generally statements made to police while the declarant (or another person) is still in personal danger are not made with consideration of their legal ramifications because the declarant usually speaks

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calling the police indicates she was reporting an alleged criminal offense, not seeking help, as was explained in this section of the Brief. She further gave a written account of the alleged events of the evening to Grant. These facts objectively show that a witness would reasonably believe the statements and the written account of the events as Henderson alleged them to be would be available for use at a later prosecution. Because the case was decided correctly under ***Davis*** and by the state court of appeals, no issue is presented worthy of certiorari.

III. Review Should Also Be Denied Because *Davis* Has Provided Significant Guidance In The Sixth Amendment Analysis In This Area Of The Law

The State contends this Court should grant its PWOC to provide useful guidance in the future in domestic violence cases. ***Davis*** was decided on June 19, 2006. The opinion clarifies and decides the issues raised in the SOT PWOC. Further, this case does not raise any new issues, nor does the SOT in their PWOC, that were not decided by the Court in ***Davis***. It would contribute little to nothing in this area of jurisprudence at this time if the SOT PWOC were granted. The direction this area of the law will take

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out of urgency and a desire to obtain a prompt response; thus, those statements will not normally be deemed testimonial . . . But after the immediate danger has dissipated, a person who speaks while still under the stress of a startling event is more likely to comprehend the larger significance of his words: If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." ***Wall v. State***, 184 S.W.3d 730, 742 (Tex. Crim.App. 2006) *citing* ***United States v. Brito***, 427 F.3d 53, 62 (1st Cir. 2005).

after ***Davis*** can only be determined after the various state and federal courts have had an opportunity to apply the principles set out in ***Davis***.

Likewise, the SOT has requested review due to the similar facts of this case and ***Davis*** and ***Hammon.*** The similarities in these cases, and the Court's holding in ***Davis*** and ***Hammon,*** weigh in favor of denial of the PWOC for the immediately preceding reasons. For all these reasons, and those set out in this Brief, no issues are presented in this case worthy of certiorari.

CONCLUSION

The state court of appeals reached the correct decision in this case according to the principles set out in ***Crawford*** and ***Davis***. The issues raised in the SOT PWOC have been settled by this Court's holding in ***Davis.*** The ***Davis*** opinion has given us significant guidance in this area of the law to which the instant case would add, at best, very little. For the foregoing reasons, the Petition should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,
v.

JETT J. MASON, JR.,
Respondent.

On Petition For Writ of Certiorari to the
Court of Appeals of Texas, Fifth District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

After Petitioner, the State of Texas, filed the petition for writ of certiorari in this case, this Court issued its opinion in *Davis v. Washington*, 126 S. Ct. 2266 (2006), concerning whether statements made at a crime scene and during a 911 call were testimonial.

I. *Davis v. Washington.*

This Court recently addressed whether statements in a 911 call and statements to a police officer responding to a report of domestic violence were testimonial, such that their admission into evidence violated the Confrontation Clause. *Davis v. Washington*, 126 S. Ct. 2266 (2006).

This Court held, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 2273. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-74.

However, this Court did not attempt to produce an exhaustive classification of all conceivable statements in response to police interrogation as either testimonial or nontestimonial. *Id.* at 2273.

This Court explained that in domestic violence situations, "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 2279 (citing *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004). A 911 call and the related initial

interrogation "is ordinally not designed primarily to 'estabis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance. *Id.* at 2276. A statement about an emergency is not a substitute for trial testimony. *Id.* at 2277. "No 'witness' goes into court to proclaim an emergency and seek help." *Id.*

In the *Davis* case, this Court noted the following about the circumstances surrounding the interrogation and the statements. The victim was speaking about events as they were actually happening, rather than describing past events. *Id.* at 2276. In contrast, the interrogation in *Crawford v. Washington*, 541 U.S. 26 (2004), occurred hours after the events that were described. *Id.* Any reasonable listener would recognize that the victim was facing an ongoing emergency. *Id.* The victim's call was plainly a cry for help against a physical threat. *Id.* Viewed objectively, the nature of the questions and the statements were necessary to be able to resolve the emergency rather than simply to learn what had happened in the past. *Id.* The witness in *Crawford* was responding calmly to questions at the police station, while the victim in *Davis* gave frantic answers over the phone in an environment that was not tranquil or even safe. *Id.* at 2277. This Court concluded that the circumstances of the interrogation in *Davis* objectively indicated that its primary purpose was to enable police assistance to meet an ongoing emergency. *Id.* This Court recognized that statements of that type need not be made in 911 calls for them to be nontestimonial. *Id.* at 2279. This Court observed that officers who arrive on the scene of domestic disputes and who need information to assess the situation and ascertain danger, may make initial inquires that *often* produce nontestimonial statements. *Id.*

In contrast, in the *Hammon* case, which was consolidated with *Davis*, this Court noted there was no emergency in progress. *Id.* at 2278. The officer heard no arguments or crashing and saw no one throw or break anything. *Id.* At first, the witness told the

officer that things were fine and that there was no immediate threat to her. *Id.* When the officer questioned the witness the second time, he was not trying to determine what was happening, he was trying to determine what happened. *Id.* This Court held that, objectively viewed, the primary purpose of the interrogation was to investigate a possible crime. *Id.* In discussing the formality of the interrogation, this Court compared the setting with that in *Crawford* and stated that both witnesses' interrogations were conducted while being actively separated from the defendants; the statements were in response to police questioning and deliberately recounted past criminal events; and they both took place some time after the events described were over. *Id.* The statements in *Hammon* were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 2279.

II. The Statements in the Present Case Were Not Testimonial Under *Davis*.

Shortly after a 911 call was made, Sergeant Donald Blasingame arrived at a residence. 2 RR 10, 12, 14, 34-35. Sarah Henderson answered the door. She was extremely upset, crying, and mad. 2 RR 10, 35-36, 41-42. The area around Henderson's mouth and nose was reddening and swelling. 2 RR 10, 36. Blasingame asked Henderson why she called the police. 2 RR 13, 22, 23, 24, 26, 27, 50. Blasingame was merely trying to find out why he was there. 2 RR 22-23. Henderson told Blasingame that that when she told Jett Mason that his phone was ringing, Mason slapped her in the face, shoved her off the bed, slapped her some more, put his hand on her throat, and told her he was going to kill her. 2 RR 11, 36.

Henderson's statements were made while she was upset, cyring, and mad, similar to the frantic nature of the statements in *Davis*. *Davis*, 126 S. Ct. at 2277. Mason had threatened to kill Henderson, and he was still present when the police arrived. Thus,

there was imminent danger against a bona fide threat. *Davis*, 126 S. Ct. at 2276. The statements were necessary for Blasingame to resolve that danger by staying, locating Mason, and keeping him away from Henderson.[1]

Mason asserts the danger had passed by then, however, Mason does not account for the looming threat of death. This case underscores a difference between domestic violence cases and most other crimes, even crimes of violence. The alleged batterer lives with the alleged victim. When the police arrive to a domestic violence call, they should be aware that both parties are likely present and that there is a significant danger that violence is occurring or will resume. That is why the State of Texas argues in the petition for writ of certiorari that the nature of domestic violence makes these types of situations different from other crimes. The State of Texas is not arguing, as Mason suggests, for some domestic violence exception to the Confrontation Clause because these cases are difficult to prosecute, a matter that was rejected in *Davis*. The State of Texas is arguing that the nature of domestic violence cases is a factor to be taken into consideration

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[1] Mason contends that the State of Texas did not raise an argument about a cry for help or about the dynamics of domestic violence in its brief in state court. This is incorrect. First, the State of Texas argued in its brief, *inter alia*, that courts have admitted statements made to responding officers when the statement was made primarily to seek safety or aid from police and also when the officer did not know the nature of the crime involved, the identity of the alleged assailant, or the medical concerns of the victim. State's Brief at 8. The State argued that Henderson was concerned only about her immediate safety. State's Brief at 12. Second, the argument by the State of Texas on the issue is properly before this Court. *See Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (holding that the Court has clear jurisdiction to consider a constitutional issue raised and contested at every level of the state court system); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899) (holding that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discusssed").

when making the objective determination of whether a statement is testimonial. The State of Texas has also pointed out that the sheer number of domestic violence cases in which the victim does not wish to participate makes the Confrontation Clause issue especially significant.

As the State of Texas argues in the certiorari petition, domestic violence victims frequently call the police for protection and for safety, rather than for the prosecution of the batterer. They need protection because the batterer is living in the same residence. Although Justice Thomas recognized in the dissenting opinion in *Davis* that the alleged batterer can constitute a continuing danger to the alleged victim, requiring further police presence or action, 126 S. Ct. at 2284, the majority opinion did not discuss that unique aspect of domestic violence cases. Of course, such a discussion was unnecessary under the facts of *Davis* and *Hammon*, because the police in *Davis* were not faced with that situation, and the police in *Hammon* already secured the scene before the witness first told the police what had happened.

Nevertheless, in the present case, there was a specific danger in the form of Mason's threatening to kill Henderson. Under Mason's theory, there was no danger unless Blasingame saw Mason actually trying to kill Henderson at that time. Mason also relies on the fact that Henderson's statements were in the past tense, as in *Hammon* and *Crawford*, rather than in the present tense, as in *Davis*. If there is no emergency unless officers see one actually occurring, or if a statement can be made for the purpose of emergency assistance only if it describes events in the present tense, that would undercut this Court's rationale for holding statements made to enable police to meet an ongoing emergency are nontestimonial. This Court recognized that officers responding at a scene often must make initial inquiries that produce notestimonial statements for their safety and to protect others from danger. *Davis*, 126 S. Ct. at 2279. Determining whether a statement made for

safety or emergency purposes is testimonial or non-testimonial, based on whether it is made in the present tense, would be making an arbitrary distinction that does not necessarily demonstrate objectively why the statement was made. Rather, the circumstances in which the statement was made must be examined.

Mason also contends that in addition to being upset and crying, Henderson was angry. Mason claims that a person does not become angry when facing danger. But, it is not at all inconceivable that a person who has been threatened with death would become angry.

Mason also argues that the statements were testimonial because Henderson gave a written account of what happened. Officer Cody Graham arrived shortly after Blasingame. 2 RR 41. Graham took Henderson's statement sometime after Blasingame talked to Henderson, because Blasingame testified that he was not there when Graham took the statement. 2 RR 41. There was no written statement introduced into evidence. The fact that a written statement was taken sometime after Henderson first talked to Blasingame does not diminish the oral statements' nature as a cry for help. It would be common for an officer at the scene to take a written statement from an alleged victim after the emergency, protective, safety-oriented actions were taken. That has nothing to do with the circumstances under which the initial statement was made.

Mason contends that the fact that Blasingame talked to Henderson and Mason separately shows the statements were testimonial. However, Henderson answered the door and immediately responded to Blasingame's initial question. After that, Blasingame located Mason and talked to him. This was not a situation in which the police separated the two and only then asked what was happening.

Mason asserts that he was found in the bedroom and appeared to have been asleep when Blasingame found him. Mason also notes that Henderson told Mason she was calling the police. Mason argues that these show that any emergency situation had ended and that Henderson was merely reporting a crime, rather than seeking help. It is not clear how Henderson's threatening to call the police in an effort to stop a beating makes the actual contact with the police responding to the scene a mere opportunity to report a crime rather than an opportunity to obtain protection from the domestic partner's having threatened to kill her. Also, even if Mason had been asleep when Blasingame found him, that does not make the situation not dangerous. Mason was asleep when he woke up, assaulted Henderson, and told her he would kill her. Mason argues that the fact that things were fine before the alleged assault shows that this was an occurrence of short duration. On the contrary, the unexpected flare up of violence by Mason demonstrates the volatile situation that was present. The only uncertainty was when Mason might wake up and act on his threat to kill Henderson. Mason's argument is akin to saying there is no emergency when someone is in the bedroom with a bomb and a fuse, because the lighter is in the kitchen. For Henderson, the question would be when Mason would wake up and explode.

This case is not like *Hammon*. There, the witness told the officer that nothing was amiss. *Davis*, 126 S. Ct. 2272. She did not tell the officer about what happened until an officer had already found her husband and had talked with him. *Id.* One officer stayed with the husband, and the other officer returned to the witness and again asked her what had occurred. *Id.* After the witness related the events to the officer, the officer had her fill out and sign an affidavit. *Id.* The witness's statements were not made to seek assistance in an emergency, nor were they a cry for help.

Here, an officer arrived at Henderson's home and saw an upset, crying, and mad Henderson, who had redness and swelling

beginning around her mouth and nose. He asked her why she called the police. She told the officer that Mason had slapped her several times, put his hand on her neck, and threatened to kill her. Blasingame then found Mason in the home. Henderson's statements, although not made on the phone and not made in present tense, nevertheless explained what the situation was, including that her boyfriend threatened to kill her. Objectively viewed, the initial interaction between Henderson and Blasingame was necessary to resolve the then present emergency and Henderson's statements were a call for help against Mason's threat to kill her. Under *Davis*, the statements were not testimonial.

III. This Court Should Grant the Petition, Address the Significant Issue in this Case, and Determine that Henderson's Statements Were Not Testimonial.

The State of Texas argued in its petition that if this Court determined that the statements in *Davis* and *Hammon* were nontestimonial, this Court should grant the petition, vacate the state court's judgment, and remand the case to that court. The State of Texas argued that if this Court determined that those statements were testimonial, this Court should grant the petition and address the issue in the present case, because there were factors supporting the nontestimonial nature of Henderson's statements that were not present in those cases — Mason's threat to kill Henderson being the most significant one. However, this Court determined that the statements in *Davis* were nontestimonial while the statements in *Hammon* were testimonial.

Davis involved statements made in a 911 call apparently relating an assault as it was happening. Among the facts this Court found significant were that the statements were made in the present tense and the caller was alone with the assailant.

Hammon involved statements made at the scene to responding officers. The witness did not tell the police what was

happening until the police had already secured the scene.

Here, as soon as the officer arrived, Henderson related the events to him, explaining that her boyfriend slapped her several times, put his hand on her neck, and threatened to kill her.

Each of these cases involves scenarios that occur in domestic violence cases. In *Davis*, the statements were made in a 911 call during an assault. In *Hammon*, the statements were made to a responding officer after the assault and after the police had already secured the scene. Here, the statements were made to a responding officer shortly after the witness had been assaulted and after the alleged batterer threatened to kill her, but before the police secured the scene.

This Court has resolved an issue that is likely to recur in two common scenarios, but it has not resolved the issue as it arises in the present case. The State of Texas suggests that the situation in the present case is at least as common, and perhaps more common, than the ones in *Davis* and *Hammon*, particularly in domestic violence cases. Of course, the resolution of the issues in these three cases would be applicable to emergency, cry-for-help situations in cases that do not involve domestic violence. However, because of the prevalence of the unavailability of victims as witnesses in domestic violence trials, as pointed out in the petition, these issues arise with alarmingly greater frequency in domestic violence cases. The uniqueness of domestic violence cases makes it a common situation for the responding officer to find both the victim and the batterer to still be at the scene.

The State of Texas suggests that had this case come to this Court at the same time as *Davis* and *Hammon*, it would have made an excellent companion case for this Court to lay the framework for Confrontation Clause jurisprudence in this area. Consequently, the State of Texas urges this Court to grant the petition and address the significant Confrontation Clause issue in this case to provide more

comprehensive guidance for this unfortunately reccurring problem.

IV. Alternatively, This Court Should Grant the Petition, Vacate the State Court's Judgment, and Remand the Case to the State Court for Consideration in Light of *Davis*.

In the event this Court decides not to grant the petition to address the merits of the Confrontation Clause issue presented in this common, recurring scenario, the State of Texas asks this Court to grant the petition, vacate the state court's judgment, and remand the case to that court. *See Billingslea v. United States*, 126 S. Ct. 2980 (2006); *Anderson v. Alaska*, 126 S. Ct. 2983 (2006); *Thomas v. California*, 126 S. Ct. 2983 (2006); *Wright v. Minnesota*, 126 S. Ct. 2979 (2006); *Warsame v. Minnesota*, 126 S. Ct. 2983 (2006); *Forrest v. North Carolina*, 126 S. Ct. 2977 (2006); *Lewis v. North Carolina*, 126 S. Ct. 2983 (2006); *Castellanos California*, 126 S. Ct. 2965 (2006).

The state court considered the particular facts of the situation, such as the excited nature of the statements and whether the statements were made out of concern for safety (PA 4), to be subjective and not objective and thus not proper for the test set out in *Crawford*. PA 4, 8-9. As argued in the petition, the state court considered only the words and not the circumstances. That court did not have the benefit of this Court's opinion in *Davis*, in which this Court determined that statements made in circumstances which, viewed objectively, show the statements were made for safety concerns in emergency situations, are nontestimonial.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari.

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